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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE: B-188302 . . . DATE: October 3, 1977**

**MATTER OF: Colt Industries, Water and Waste Management  
Operation**

**DIGEST:**

Protest based on allegation that successful bidder was nonresponsive for failure to submit Coast Guard certification letter for specific Type III marine sanitation devices it proposed to furnish is denied. IFB only required, and bidder submitted, copy of certification letter for any Type III device. Similarly, applicable statute and regulations do not affect responsiveness of bid.

Colt Industries (Colt), Water and Waste Management Operation, protests the award of a contract by the Coast Guard to Jered Industries, Inc. (Jered), under invitation for bids (IFB) No. H-85-0240-6013-0. The protest arises from Jered's alleged failure to comply with the terms of the IFB, which Colt contends required each bidder submit with its bid a certification letter for the specific marine sanitation devices (MSD) offered in response to the IFB.

The IFB solicited bids to provide vacuum Flush MSD's for WMEC and WHEC class cutters. Part C-27 of the IFB provided that:

"BIDS SHALL BE ACCEPTED ONLY FROM THOSE MANUFACTURERS WHO HAVE BEEN TYPE CERTIFIED BY USCG TO PRODUCE A MARINE SANITATION DEVICE UNDER 33 CFR 159.15. YOUR ATTENTION IS DIRECTED TO PARAGRAPH 3.18 (d) PAGE 16 OF SPECIFICATION G-ENE-21-76 DTD 15 JULY 1976, PAR. 3.17 (d) PAGE 13 OF G-ENE-23-76 DTD 1 JANUARY 1976, WHICH REQUIRES THE SUBMISSION OF A COPY OF THE USCG CERTIFICATION LETTER WITH THE BID."

B-188302

The designated specifications were incorporated in the IFB and each contained the following provisions:

"1.2 Type - Each system shall be a wastewater collection Marine Sanitation Device, U.S. Coast Guard certified as a type III Marine Sanitation Device, under 33 C.F.R. 159.15. [A type III MSD is a device designed to prevent the overboard discharge of treated or untreated sewage or any waste derived from sewage. 33 CFR 159.3 (s).]

\* \* \* \* \*

"2.1 The following Government standards and specifications of the issue in effect on the date of this solicitation form a part of this purchase description.

"a. Part 159 of Chapter I of Title 33 of the Code of Federal Regulations in effect 30 January 1975 as amended 12 April 1976. Marine Sanitation Devices, Certification Procedures and Design and Construction Requirements.

\* \* \* \* \*

"3.1 General - The vacuum flush collection marine sanitation device herein specified shall be certified in accordance with subpart 159.14 of the regulations (2.1a).

"3.17 The bidder shall submit with his bid the following items:

\* \* \* \* \*

"d. A copy of the U. S. Coast Guard certification letter for the type of Marine Sanitation Device." (This same provision is designated paragraph 3.18(d) in specification G-ENE-21-76.)

The regulations incorporated by the specifications were issued pursuant to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, title III, § 312, October 18, 1972, 86 Stat. 816, 871, codified as 33 U.S.C. § 1322 (Supp. V 1975). That section provides in pertinent part:

"(g)(1) No manufacturer of a marine sanitation device shall sell, offer for sale, or introduce or deliver for introduction in interstate commerce \* \* \* any marine sanitation device \* \* \* unless such device is in all material respects substantially the same as a test device certified under this subsection.

"(2) Upon application of the manufacturer, the Secretary of [Transportation] \* \* \* shall so certify a marine sanitation device if he determines, in accordance with the provisions of this paragraph, that it meets the appropriate standards and regulations promulgated under this section. The Secretary \* \* \* shall test or require such testing of the device in accordance with procedures set forth by the Administrator as to standards of performance and for such other purposes as may be appropriate. If the Secretary \* \* \* determines that the device is satisfactory from the standpoint of safety and any other requirements of maritime law or regulation, and after consideration of the design, installation, operation, material, or other appropriate factors, he shall certify the device. Any device manufactured by such manufacturer which is in all material respects substantially the same as the certified test device shall be deemed to be in conformity with the appropriate standards and regulations established under this section."

Detailed certification procedures are set forth in 33 C.F.R. § 159 (1976).

Certification indicates that the device meets standards established by the Environmental Protection Agency and the Department of Transportation which are designed to prevent the discharge of untreated sewage from vessels. 33 C.F.R. § 159.1 (1976). It extends to MSD's which are "in all material respects substantially the same" as a certified MSD. See 33 U.S.C. § 1322(g)(2) (Supp. V 1975); 33 C.F.R. § 159.16(a) (1976).

Before issuing the instant IFB, the Coast Guard determined that two manufacturers--Colt and Jered--had certified equipment that would satisfy the requirements of the purchase description. These companies were listed on the procurement request as known supply sources. Only these companies submitted bids. Colt offered to supply the required items

B-188302

for a total price of \$770,583. Jered offered to provide the required items for \$592,942. Each company indicated that its bid conformed to the specifications of the IFB. In addition, each company submitted a copy of a Coast Guard certification letter for a Type III MSD.

Colt submitted a copy of a letter from the Chief, Survival Systems Branch, Merchant Marine Technical Division of the Coast Guard, stating that Colt's ENVIRONVAC sewage system, a Type III MSD, had been reviewed for conformance with the applicable sections of Coast Guard marine and electrical engineering regulations (46 C.F.R. parts 50-63 and 110-113, respectively). The letter further stated that Colt's vacuum toilet, vacuum urinal, and gray water valve were accepted for installation aboard vessels inspected and certificated by the Coast Guard. Colt also submitted letters from the same office which assigned its ENVIRONVAC Sewage, Collection, and Retention System, U. S. Coast Guard Certification Number 159.15/1016/1/III and authorized Colt to label those MSD's it manufactures that are "in all material respects substantially the same" as the device assigned the above number. The label is Colt's certification to its customers that the labeled device is "in all material respects substantially the same" as the certified test device.

Similarly, Jered submitted a copy of the letter assigning its Model 118-1, also a Type III MSD, Coast Guard Certification Number 159.15/1011/1/III. While Jered was also authorized to label its MSD's which are "in all material respects substantially the same" as the certified test device, Jered did not submit a copy of this authorization with its bid.

Colt filed a protest with the contracting officer urging rejection of the Jered bid as nonresponsive for failure to comply with the quoted provisions of the IFB. Colt alleged that these provisions prohibited the acceptance of a bid "unless the system specified and offered has been previously certified." Colt contended that Jered's certification letter for the model 118-1 did not apply to the equipment specified in the solicitation.

In reply to this protest, the contracting officer stated:

- "\* \* \* 1. There is no requirement that the items called for in the IFB and specifications must be certified prior to bid opening.

- "2. There is a requirement that a copy of the U.S. Coast Guard certification letter for the type of Marine Sanitation Device be submitted with the bid. Jered Industries, Inc. submitted a copy of the U. S. Coast Guard certification letter which complies with this requirement.
- "3. I find the bid of Jered to be responsive and it must be considered for award under the terms of the solicitation."

Colt supplemented its protest, contending that the certification letter submitted by Jered did not satisfy the requirements of the solicitation since the system offered by Jered for WMEC class cutters is completely different than the system (and its two subsystems) offered for WMEC class cutters. Colt offered no evidence in support of this contention. Colt further stated:

"Specification G-ENE 21-76 dated 15 July 1976, Page 16, Item 3.18 states, 'The bidder shall submit with his bid the following items:—d. A copy of the U.S. Coast Guard certification letter for the type of Marine Sanitation Device.' It is inconceivable that the term 'type' could refer to anything except the specific vacuum systems defined by [the IFB]. If the term 'type' were to mean any Type III device (as you have concluded), then the required certification letter could be for any Type III device (possible oil flush or recirculation) and not for the specific system required. Therefore a potential bidder could have been certified for a Type III device (namely oil flush with no overboard discharge), have never built or designed a vacuum system, and would be awarded a contract under your interpretation."

The letter concluded by stating that the contracting officer's interpretation would permit post-bid certification, negating the intent of item 3.18.

According to Colt, award of the contract to Jered violates 33 U.S.C. § 1322 (Supp. V 1975), which prohibits a manufacturer from selling or offering for sale an MSD unless the device so offered is certified by the Coast Guard or is "in all material respects substantially the same" as a certified device. Colt concludes that this section precludes Jered from offering any MSD to the Coast Guard unless and until it has obtained a certification therefor.

B-188302

The Chief of the Survival Systems Branch, Merchant Marine Technical Division of the Coast Guard, who is responsible for administration of the certification program, has replied as follows:

"1. \* \* \* The issue is whether or not the system offered by Jered was certified under 33 CFR, Part 159, at the time of bid submittal.

"2. As noted \* \* \* [in an earlier memo], the 'certifiable' components of an engineered vacuum flush sewage collection system are the vacuum toilets, vacuum urinals, and grey water collection valves. The Coast Guard issued a certification to Colt Industries on 11 August 1976 \* \* \* which covered any vacuum flush system consisting of components 'in all material respects substantially the same' as the following components:

- "a. Vacuum Toilet Bowl with Controls, Colt Dwg. No. 2700538.
- "b. Grey Water Valve with Timer and Activator Mechanism, Colt Dwg. Nos. 2700419, 2700417, 2700418.
- "c. Urinal Valve, Colt Dwg. Nos. 2700428, 2700429, 2700430.

"Similarly, the Coast Guard issued a certification to Jered Industries \* \* \* which covered any vacuum flush consisting of components 'in all material respects substantially the same' as the following components:

- "a. Water Closet Assembly, Jered Dwg. No. H20118F001.
- "b. Urinal Discharge Valve and Grey Water Valve, Jered Dwg. Nos. F90057B001 and F90066B001.
- "c. Urinal Assembly, Jered Dwg. No. H20118B001.

"3. If Colt and Jered offered for sale, under Solicitation No. H85-0240-6013-0 vacuum flush sewage collection systems made up of the above components, then both bidders were in full compliance with 33 U.S.C. § 1322(g)(1); the Coast Guard's implementing regulations \* \* \* and the terms of the subject solicitation."

The contracting officer has also stated:

"2. During the preparation of the purchase description for this procurement a review was made of the certified equipment available in order to insure that the procurement would be open to the maximum number of potential competitors. The review revealed that both Colt and Jered had certified equipment which would satisfy the requirements of the purchase description. The solicitation required evidence of certification which both bidders submitted.

"3. In summary, both Colt and Jered had systems which would meet the requirements of the purchase description for this procurement, both submitted evidence of certification, and on the basis of the information submitted both were responsive bidders. Accordingly, the award to Jered as the lowest responsive, responsible bidder was correct."

Resolution of this protest depends on how the provisions of the IFB dealing with certification are interpreted. In our view, the specifications do not include a requirement that the device offered must be certified at the time of bid. Instead, part C-27 only requires the bidder to be "type-certified" and to submit a copy of the certification letter. Part C-27 does not require the bidder to be certified for the specific device offered, but would be satisfied by submission of a certification letter for any Type III device.

Similarly, paragraph 3.17(d) of G-ENE-23-76 and paragraph 3.18(d) of G-ENE-21-76 only require the bidder to submit a copy of the certification letter for the "type" of marine sanitation device. In the context of 33 C.F.R. § 159, wherein marine sanitation devices are designated particular "types" according to their function (Type I, Type II, and Type III), the only logical interpretation is that the term refers to a general classification rather than a specific model of an MSD.

B-188302

Moreover, neither paragraphs 2.2 and 3.1 nor any of the specifications state that the MSD offered and specified must be certified at the time of bid. If the Coast Guard had intended to require prebid certification, it could have included an explicit provision to that effect. Its failure to do so in the instant case was apparently deliberate. As the protester notes, the Coast Guard had included such a provision in a previous solicitation. Thus, we conclude that the specifications did not require prebid certification of the item to be delivered and did not call for rejection of Jered's bid as nonresponsive, because Jered submitted a compliant certification.

This interpretation is more reasonable than Colt's, which would preclude any manufacturer from offering MSD's for sale until they had been certified or a substantially similar system had been certified. The Coast Guard and other potential buyers of MSD's would be restricted to purchases of systems previously developed and certified. They could not solicit proposals for new and different systems. In light of the variation in design requirements from vessel to vessel, such an interpretation is overly restrictive. The Coast Guard's interpretation, which permits post-bid certification, allows for innovation while simultaneously insuring that environmental standards are met. Since the successful bidder must provide certified devices, and certification can only be obtained through compliance with the applicable Coast Guard regulation, the Coast Guard is assured that the environment will be protected. Neither the letter nor the spirit of the Coast Guard regulations is violated.

In the instant case, it is apparent that "innovation" was intended, as each bidder was required to, and did, submit a statement of design considerations, as well as a list of system optional items that would be available to compensate for variances in site conditions. These provisions indicate that the proposed device could vary from the specified device and imply that the requirement for evidence of certification was directed to the ability of the manufacturer to deliver a satisfactory Type III device (responsibility)—not to the actual operating capability of the device itself (responsiveness). Cf. United Power and Control Systems, Inc., B-184662, May 25, 1976, 76-1 CPD 340, wherein we concluded that differences between the experience requirements were directed at the bidder's past demonstrated ability to deliver a successfully operating similar model. As such, the submitted certification in the instant case need not have pertained directly to the offered MSD but related to responsibility.

B-188302

Colt views the allowance of post-bid certification as a violation of 33 U.S.C. § 1322(g)(1) (Supp. V 1975) and the implementing regulations. The statute, in essence, permits a manufacturer to offer for sale only certified MSD's or MSD's that are substantially similar to a certified MSD. When Jared signed the bid requiring it to provide a certified system and the bid included the required Type III certification for a system containing the essential components, it was offering for sale and bound to furnish in compliance with the statute a system "substantially the same" as that certified.

In view of the foregoing, the protest is denied.

  
Acting Comptroller General  
of the United States